

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Petitions of
Global Crossing Telecommunications, Inc.
and SBC Communications, Inc.
for Declaratory Ruling

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WCB Docket No. 04-424

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To: Chief, Wireline Competition Bureau

JAN - 7 2005

Federal Communication Commission
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**COMMENTS ON SBC'S PETITION
FOR DECLARATORY RULING**

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**COMMENTS ON SBC'S PETITION
FOR DECLARATORY RULING**

Global Crossing Telecommunications, Inc. ("Global Crossing"), by its attorneys, hereby submits comments on the Petition for Declaratory Ruling filed with the Federal Communications Commission ("FCC" or "Commission") by SBC Communications, Inc. ("SBC").¹ The Commission issued a Public Notice on December 8, 2004² requesting comment on the SBC Petition and on the Petition filed by Global Crossing (the "Global Crossing Petition") in the same judicially-referred matter.

¹ SBC's Petition for Declaratory Ruling, *In re* SBC Communications, Inc. Petition for Declaratory Ruling Concerning Terminating Switched Access Charges for Wireless-Terminated Calls (filed Nov. 12, 2004) ("*SBC's Petition*"). SBC presumably filed on behalf of Southwestern Bell Telephone, L.P. However, the party of record in the action referred to the FCC by the United States District Court for the Eastern District of Missouri Eastern Division is "SWBT," styled as "d/b/a 'SBC Missouri.'"

² Pleading Cycle Established for Petitions of Global Crossing Telecommunications, Inc. and SBC Communications, Inc. for Declaratory Ruling, *Public Notice*, WC Docket No. 04-424 (Dec. 8, 2004).

I. SBC's Petition For Declaratory Ruling Admits To All The Elements Necessary For An FCC Declaratory Ruling Granting The Global Crossing Petition.

SBC's Petition agrees with the Global Crossing Petition that (1) the geographic location of the called and calling parties is the proper determinant of jurisdiction for mobile calls,³ and (2) the SWBT Tariff methodology is divided between calls “*where the jurisdiction can be determined from the call detail*” and where the jurisdiction *cannot* be determined by the call detail.⁴ Further, *SBC's Petition* agrees with Global Crossing that “the call detail that Global Crossing provides to SWBT is insufficient to identify *the precise geographic location* of the originating wireless customer.”⁵ These admissions are sufficient for the Commission to issue the ruling requested by Global Crossing.

1. SBC states that geography is the correct determinant of jurisdiction, where feasible.

For the first point – that the geographic location of the parties is the proper determinant of jurisdiction for mobile calls – SBC cites to FCC precedent. SBC quotes from the Commission's 1996 Order implementing portions of the Telecommunications Act of 1996 concerning interconnection of CMRS carriers with LECs. There, in discussing mobile traffic the Commission stated clearly, “[T]he geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges.”⁶ Global

³ *SBC's Petition* at 7.

⁴ SWBT Tariff F.C.C. No. 73, § 2.4.

⁵ *SBC's Petition* at 5.

⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15,499, ¶ 1044 (1996).

Crossing agrees with SBC (and the FCC) that mobile calls are properly characterized as interstate or intrastate based on the geographic location of the called and calling parties.

2. SBC states that the geographic location of a mobile caller cannot be determined from the call detail.

SBC's Petition states unequivocally, "What the parties agree upon is that the call detail that Global Crossing provides to SWBT is insufficient to identify the *precise geographic location* of the originating wireless customer."⁷ By its inclusion of the word "precise" and its italicization of the phrase "precise geographic location," SBC implies that its lack of knowledge about the originating point of the calls at issue is close, but just off the mark. In fact, SBC has no clue about the location of the mobile caller, precise or otherwise. Whether they are in Kansas, California or China is totally unknown to SBC. All SBC knows is the telephone numbers of the mobile callers. Thus, SBC's admission that it does not know the *precise* location of the mobile caller is in fact an admission that the call detail tells it *nothing* about the location of that caller.

3. SBC's tariff has two provisions for determining jurisdiction, one that applies to where the originating and terminating points are "known" and one that applies where those points are "unknown."

SBC's tariff has two provisions for determining jurisdiction, one that applies to where the originating and terminating points are "known"⁸ and one that applies where those points are "unknown".⁹ This statement is not subject to dispute. The remaining question is which provision applies to mobile traffic. This question of tariff construction is the only question raised in this dispute, which is really a matter of Global Crossing's lawsuit to recover the millions of

⁷ *SBC's Petition* at 5.

⁸ SWBT Tariff F.C.C. No. 73, § 2.4.1(A)(2)(b) ("where jurisdiction can be determined from the call detail...").

⁹ SWBT Tariff F.C.C. No. 73, § 2.4.1(A)(1) ("when the customer does not have sufficient data to determine jurisdiction...").

dollars it has been overcharged by SBC over the past months by SWBT's application of the wrong provision.

4. SBC's reading of its own tariff and FCC precedent is absurd.

The only real dispute raised by *SBC's Petition* is whether, under the terms of its tariff, the jurisdiction of the mobile traffic at issue is "known" or "unknown." Here, SBC takes the absurd position that – while admitting that in fact the location of the mobile phone user is "unknown" – under its tariff that person's location is "known." SBC argues erroneously both that (1) this legal fiction is clear on the face of its tariff and (2) the FCC has sanctioned such an obviously wrong assumption for rating purposes. Both of these claims are patently incorrect.

First, the tariff language itself. The relevant provisions state simply and clearly that "where call detail is insufficient to determine jurisdiction, the customer will be provided a projected percentage of interstate use (PIU)."¹⁰ As quoted above, SBC admits that "the call detail that Global Crossing provides to SWBT is insufficient to identify the *precise geographic location* of the originating wireless customer." As also noted above, and as SBC cannot dispute, it has *no* knowledge of the location – not precise, not imprecise, nothing. This should be enough for the Commission to interpret the tariff. The language is plain on its face; the call detail does not identify the geography of the call, so the surrogate to be used is PIU. There is no other surrogate provided for in the tariff; this is because there is no other surrogate sanctioned by the FCC.

SBC contends otherwise, however. It claims that other portions of the tariff modify the clear language regarding the use of PIU. Specifically, SBC cites a definitional portion of the tariff for the language that "interstate terminating access minutes" are "access minutes where the

¹⁰ SWBT Tariff F.C.C. No. 73, § 2.4.

calling number is in one state and the called number is in another state.”¹¹ SBC does not explain how this definition of “interstate access minutes” can modify the sentence, “Where call detail is insufficient to determine jurisdiction the customer will provide a projected percentage of interstate use” when the phrase “interstate access minutes” does not appear in the sentence, or even in the paragraph.¹²

Further, SBC advances an unpersuasive reading of the language, which it claims modifies the PIU provision. It argues that the phrase “where *the calling number* is in one state and *the called number* is in another state” supports the proposition that geography is irrelevant and only the phone numbers matter when determining jurisdiction. This is clearly wrong, for the many reasons cited in the Global Crossing Petition and agreed to by the SBC Petition.

Jurisdiction is about geography, not telephone numbers, and the only value of the telephone numbers is to serve as indicators of *actual* geographic locations. When the telephone number no longer bears any relation to the geographic location of the call, the number loses all value for making jurisdictional determinations. The Commission has never said that jurisdiction is a legal fiction based on arbitrary number assignments. In fact, the Commission has expressed exactly the opposite view on numerous occasions.¹³ Yet when the nature of the service makes it impossible to perform the traditional “end-to-end analysis” based on the physical end points of

¹¹ *SBC’s Petition* at 3.

¹² SWBT Tariff F.C.C. No. 73, § 2.4.

¹³ See e.g., *In the Matter of Vonage Holdings Corporation*, FCC 04-267, WC Docket No. 03-211, ¶ 17 (Nov. 12, 2004) (“the Commission has traditionally applied its so-called ‘end-to-end [jurisdictional] analysis’ based on the physical end points of the communication.”); see also 47 U.S.C. § 153(22); *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000).

the communication, it becomes impossible to rely on this analysis.¹⁴ For example, a subscriber who resides in one state might use his mobile service from anywhere in the world, but if he were to call someone with a NPA/NXX associated with his home state, under SBC's view the call would be an intrastate call.¹⁵ This is not legally correct and it is not what SBC's tariff states.

The only acceptable reading of SBC's tariff language is that "calling number" refers to the location of the caller and "called number" refers to the location of the recipient of the call, not SBC's backwards claim that the numbers are all that matter and that the numbers trump geography where the two are known to be in conflict. Any other interpretation would make the language inconsistent with basic concepts of jurisdiction recognized by the Commission and the courts scores of times over decades. In short, the reading advanced by SBC is not only wrong, it would make the tariff legally unacceptable by its nonconformance to the Act and FCC precedent.¹⁶

Finally, SBC's weak attempt to find FCC precedent in support of its defective tariff reading falls flat. For example, SBC claims that the 1989 Joint Board Recommended Decision supports its view in the statement that "ANI capability enables the carrier to identify the originating number of a call which when combined with the called number *reveals the*

¹⁴ The Commission noted that the "end-to-end" jurisdictional analysis cannot be applied to Internet services such as Vonage's DigitalVoice service. *Vonage* at ¶ 24. The Commission and other commenters further found Vonage's DigitalVoice service to be very similar to CMRS, and emphasized the difficulty in correctly identifying the jurisdiction of such calls. *Id.* at ¶¶ 22-24. "Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber," thus "making jurisdictional determinations about particular DigitalVoice communications based on an end-point approach difficult, if not impossible." *Id.*

¹⁵ *Vonage* at ¶ 27.

¹⁶ See 47 U.S.C. § 153(22) (defining "interstate communication").

jurisdictional nature of the call.”¹⁷ In the context of most wireline calls, which is the context in which the Joint Board was speaking in 1989, the statement is usually true. SBC’s argument breaks down, however, when rationality is injected into the analysis. The Joint Board was recommending the use of telephone numbers as an *indicator* of geography, not as a jurisdictional determinant in themselves. Again, geography trumps telephone numbers, not vice versa. As a consequence, the Joint Board also recommended that when the *geographic location* is unknown – *not* when the number is unknown – that another method be used. And that method is PIU.

SBC’s attempt to use the Commission’s 1996 *Local Competition Order* is equally unconvincing. SBC is correct that the FCC discussed the jurisdictional issues relating to access charges for mobile calls in that Order. It is also correct that the Commission suggested that alternatives to geographic location could be utilized for jurisdictional purposes in such calls. And it is correct when it quotes the Commission that one good way to do this might be traffic studies that rely on “the initial cell site” as the originating point of a mobile call. But then SBC’s logic goes terribly wrong. From these FCC statements, SBC leaps to the erroneous argument that the FCC endorsed simply ignoring geography and relying on the telephone numbers – even though all parties agree that they do not indicate the correct jurisdiction for the call. That is simply a stretch of the FCC’s language far beyond its limits, with no FCC precedent to support it.

Ironically, for SBC’s argument to work, one would have to ignore the plain language of SBC’s tariff. The PIU portion of its tariff does not mention numbers as the basis for jurisdiction. Rather, the tariff states clearly that “where call detail is insufficient to determine jurisdiction, the

¹⁷ *SBC’s Petition* at 6.

customer will provide a projected percentage of interstate use (PIU).”¹⁸ Telephone numbers are not jurisdiction, geography is, and no amount of SBC sophistry can change that fact. The geography here is unknown, and that leads to but one conclusion – jurisdiction is to be determined by PIU.

II. The Issue Referred By The District Court Does Not Prospectively Affect Public Policy.

Global Crossing initiated this action in federal district court against SWBT (*not* the larger, regional SBC) to recover damages from SWBT for charging Global Crossing the wrong rate for terminating interstate wireless calls. Neither at the district court nor at the FCC, on referral, has Global Crossing pursued anything more than a judgment for damages for charges already assessed and paid by Global Crossing. Global Crossing has not suggested a prospective change in any policy, rule, regulation or tariff provision, nor has the district court referred to the Commission a requirement to make prospective change in policy, rule, regulation or tariff provision.

The parties dispute discrete charges based on either one, or a combination of two, SWBT tariff provisions. Global Crossing sued SWBT in district court for being charged the wrong rates as listed in SWBT’s federal access tariff for terminating interstate wireless calls. Global Crossing’s entire argument rests on the plain meaning of SWBT’s tariff provisions and the Commission’s decades-old precedent regulating the provisions of SWBT’s tariffs.

SBC is wrong when it suggests that the relief requested by Global Crossing requires broad policy changes.¹⁹ The Commission’s policies regulating SWBT’s federal access tariff has

¹⁸ SWBT Tariff F.C.C. No. 73, § 2.4.

¹⁹ *See, e.g.*, “Global Crossing is, of course, free to seek changes in Commission policy in a rulemaking proceeding.” *SBC’s Petition* at 9.

been a matter of record for decades. In fact, the tariff provisions at issue here have been on public record since at least 1998. Prospective policy is not at issue. This lawsuit is about the tariff that *is*, not the tariff that SBC wishes it had, or hopes to get in the future.

SBC's own petition is limited to two issues, neither of which require broad policy changes, rule changes, or a statement of statutory or regulatory interpretation. First, SBC asks that the Commission abide by SWBT's own interpretation of its tariff, in which SWBT emphasizes the phrase, "*where jurisdiction can be determined from the call detail . . .*"²⁰

It seems obvious that a seven-page discussion (of a twelve page petition) about a term from SWBT's own F.C.C. Tariff No. 73 negates the argument that broad, industry-wide *prospective* policy is at issue. Lengthy discussions from two parties regarding discrete tariff provisions against a backdrop of the decades-old separations process – cited at length by both parties – makes clear that this case is not about prospective policy. Suggesting otherwise distorts the district court's referral order. A referral for the sake of "a need to promote uniformity and consistency within the telecommunications field"²¹ is not the same as stating that the entire telecommunications field should be treated as necessary parties to this litigation and a sea-change of access charge policy is an issue.

Moreover, the issue referred to the FCC by the federal district court simply relates to two SWBT tariff provisions (one relating to the reliance on call detail, and another providing for measures applicable when parties are unable to determine the origin of traffic). SBC relies on one tariff provision, while Global Crossing relies on another. The choice between the two tariff

²⁰ SWBT F.C.C. Tariff No. 73, § 2.4; *SBC's Petition* at 2-9.

²¹ *Global Crossing Telecommunications, Inc. v. Southwestern Bell, L.P.*, Case No. 4:04CV00319 ERW, Order, p. 3 (citing *Access Telecomm v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (attached at Tab 2 of *Global Crossing's Petition for Declaratory Ruling*).

provisions was not clear to the district court, hence this referral. Global Crossing submits that the tariff is clear on its face and SBC is simply seeking to impose higher charges by arguing otherwise. However, even if the Commission believes the tariff is unclear, it is well established that ambiguous tariff terms must be construed against the drafter of the tariff.²² For this reason alone, SBC's tariff term should be read against SBC, not Global Crossing.

Conclusion


By promptly denying the Petition of SBC and issuing the declaratory ruling requested by Global Crossing, the Commission will satisfy the referral by the United States District Court for the Eastern District of Missouri. The Commission will further remove any uncertainty regarding the proper application of the terms of SWBT's Tariff F.C.C. No. 73 to CMRS calls handled by Global Crossing, and will permit Global Crossing's action in federal court to move forward. To the extent that any broader policy issues or prospective changes in jurisdictional separations are to be considered, they should be taken up in a separate proceeding. SBC should not be permitted to dodge a refund of overcharges to Global Crossing, all the while continuing to charge the wrong access rate, during the pendency of any sort of policy making proceeding that can lawfully have only prospective effect. For purposes of the court case which precipitated these Petitions, the tariff in place is the tariff that applies and must be interpreted.

²² *Commonwealth of Virginia State Corp. Commission v. MCI Tel. Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 10,583, ¶ 20 (2000) (recognizing that "to the extent that there is an ambiguity . . . it is construed against MCI as the drafter of the Tariff.") (citing *Halprin, Temple, Goodman, & Sugrue v. MCI Tel. Corp.*, 13 FCC Rcd 22,568 at ¶ 13 (1998)).

Therefore, for the foregoing reasons, Global Crossing respectfully requests that the Commission give definitive meaning to the provisions of SWBT's Tariff F.C.C. No. 73 as discussed herein.

Respectfully submitted,

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January 7, 2005

CERTIFICATE OF SERVICE

The undersigned, of the law firm Kelley Drye & Warren LLP, hereby certifies that s/he has served a copy of the foregoing **Comments to SBC's Petition for Declaratory Ruling** by placing a copy in the United States mail, first-class postage prepaid, addressed as follows:

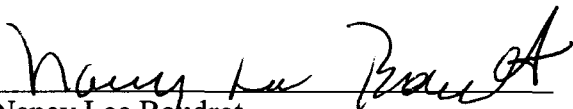
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This the 7th day of January, 2005.


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